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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

River Runners for Wilderness, et al., Plaintiffs, v. Joseph F. Alston, et al., Federal-Defendants.	No. CV-06-0894 PCT-DGC PLAINTIFFS' RESPONSE TO GRAND CANYON PRIVATE BOATERS ASSOCIATION'S MOTION TO INTERVENE

The Grand Canyon Private Boaters Association ("GCPBA") seeks to intervene in this case as a matter of right pursuant to Rule 24 (a) of the Federal Rules of Civil Procedure and, in the alternative, with permission from the Court under Rule 24 (b) of the Federal Rules of Civil Procedure. As outlined below, the GCPBA is not entitled to intervene because it lacks a significantly protectable interest that would entitle it to intervene as of right. Further, the GCPBA has failed to prove that it is entitled to intervene permissively.

However, as with the Grand Canyon River Outfitters Association's ("GCROA's") motion, the Plaintiffs, River Runners for Wilderness *et al.*, do not oppose the participation

of the GCPBA in the remedy phase of the litigation. See e.g., Forest Conservation Council v. U.S. Forest Service, 66 F.3d 1489, 1499 (9th Cir. 1995) (intervention appropriate in remedy phase of proceedings). Accordingly, should the Court find that Federal-Defendants violated federal law, the Court could allow the GCPBA and the GCROA to participate in this case for the purposes of deciding the propriety or scope of injunctive relief.

STANDARD OF REVIEW

The burden is on the applicant for intervention to demonstrate that all conditions for intervention are satisfied. Petrol Stops Northwest v. Continental Oil Co., 647 F.2d 1005, 1010 n.5 (9th Cir. 1980). While the Court construes the rules for intervention broadly in favor of the applicant, all conditions must be satisfied before intervention is granted. See Sierra Club v. EPA, 995 F.2d 1478, 1481 (9th Cir. 1993). Moreover, if the Court decides to allow intervention as of right or permissively, it may limit an intervenor's participation "subject to appropriate conditions or restrictions responsive among other things to the requirements of the efficient conduct of the proceedings." Fed. R. Civ. P. 24 (a) (advisory committee note to 1966 amendments); see also United States v. Oregon, 913 F.2d 576, 588 (9th Cir. 1990).

STATUS OF THE CASE

Plaintiffs filed this case on March 28, 2006 challenging Federal-Defendants's 2005 Colorado River Management Plan ("CRMP") and Final Environmental Impact Statement ("FEIS") for the Colorado River corridor in the Grand Canyon National Park and Federal-Defendants' February 17, 2006 Record of Decision ("ROD") adopting the CRMP. See Docket No. 1. Plaintiffs allege that Federal-Defendants' new CRMP authorizes certain types, levels, and allocations of use that violate the National Park

Service's statutory mandates, regulations, policies, and management plans. Plaintiffs seek a declaratory judgment that Federal-Defendants' new CRMP violates the National Park Service Organic Act ("Organic Act"), the Grand Canyon Protection Act, the National Park Service Concessions Management Improvement Act ("CMIA"), National Park Service regulations, policies, and management plans, and the National Environmental Policy Act ("NEPA"). Plaintiffs also seek relief related exclusively to the Federal-Defendants compliance with federal law. Plaintiffs request that the Court issue an injunction ordering Federal-Defendants to prepare a new CRMP and FEIS that remedies the violations of law articulated in the complaint.

On June 8, 2006 Federal-Defendants filed their answer. See Docket No. 15. On July 4, 2006 the Parties prepared and filed a Joint Case Management Report. See Docket No. 18. In the Joint Case Management Report the Parties agreed to specific dates for the filing of the Administrative Record, resolving disputes concerning the contents of the Administrative Record, and a schedule for briefing motions for summary judgment. Thereafter, on July 7, 2006, the first applicant intervenor – the GCROA – filed its motion to intervene as of right and permissibly.

On July 12, 2006 a Case Management Conference was held in this case pursuant to Rule 16 (b) of the Federal Rules of Civil Procedure. Following the Conference, on July 18, 2006, the Court issued a Case Management Order. The Case Management Order: (1) establishes deadlines for the filing of the Administrative Record and summary judgment briefing; and (2) grants the Parties request to bifurcate the merit and remedy phases of the litigation. On July 24, 2006 the GCPBA's filed its motion to intervene as of right and permissably.

ARGUMENT

A. THE GCPBA DOES NOT MEET THE CRITERIA TO OBTAIN INTERVENTION AS OF RIGHT

In the Ninth Circuit, intervention as of right is only granted if: (1) the application for intervention is timely; (2) the applicant has a "significantly protectable" interest relating to the property or transaction that is the subject of the action; (3) the applicant is so situated that disposition of the action may, as a practical matter, impair or impede its ability to protect that interest; and (4) the applicant's interest is inadequately represented by the existing parties. Fed. R. Civ. P. 24 (a); see also Northwest Forest Resource Council v. Glickman, 82 F.3d 825, 836 (9th Cir. 1996) (same). If an applicant to intervene fails to satisfy any one of the four requirements for intervention, the Court need not address the remaining requirements. Portland Audubon Soc'y v. Hodel, 866 F.2d 302, 310 (9th Cir. 1989), cert. denied 492 U.S. 911 (1989).

Here, the GCPBA is not entitled to intervention as of right because: (1) they do not have a "significantly protectable interest" in the case; and (2) their interests are adequately represented by Federal-Defendants.

1. The GCPBA Does Not Have A "Significantly Protectable" Interest In This Case

To intervene as of right, the GCPBA must prove it has a "significantly protectable" interest in this case and that there is a "relationship between the legally protected interest and the claims at issue." Sierra Club, 995 F. 2d at 1484. The GCPBA does not meet these conditions.

As noted, Plaintiffs seek a declaratory judgment that Federal-Defendants have violated solely federal laws, regulations, and policies: NEPA, Organic Act, Grand Canyon Protection Act, CMIA, and the various implementing regulations, policies, and

management plans. Based upon its request for a declaratory judgment, Plaintiffs seek to compel Federal-Defendants to perform their duties required by these federal laws. Only Federal-Defendants – the National Park Service, *et al.* – can be held to have violated these laws, regulations, policies and plans in the respects alleged by Plaintiffs and likewise only Federal-Defendants can be ordered to perform the duties that Plaintiffs request as relief.

In this circumstance, it is well established in the Ninth Circuit that an entity other than a defendant federal agency lacks a "significantly protectable" interest and cannot intervene as of right to participate *in the merits phase* of a lawsuit. See Kootenai Tribe of Idaho v. Veneman, 313 F.3d 1094, 1108 (9th Cir. 2002) (holding that the district court erred in allowing conservation groups to intervene as of right in a NEPA case); Wetlands Action Network v. U.S. Army Corps of Engineers, 222 F.3d 1105, 1113-1114 (9th Cir. 2000) (upholding district court's denial of a permittee's application to intervene on a NEPA claim); Churchill County v. Babbitt, 150 F.3d 1072, 1082-1083 (9th Cir. 1998) (upholding district court's denial of a public utility's application to intervene in a NEPA case); Forest Conservation Council, 66 F. 3d at 1494-95 (intervention only allowed in portion of proceedings addressing injunctive relief); Portland Audubon Society, 866 F.2d at 309 (timber industry denied intervention in NEPA case).

As explained by the Ninth Circuit, "[t]he rationale for our rule is that, because NEPA requires action only by the government, only the government can be liable under NEPA. A private party cannot 'comply' with NEPA, and, therefore, a private party cannot be a defendant in a NEPA compliance action." Churchill County, 150 F.3d at 1082. NEPA "does not regulate the conduct of private parties or state or local governments. It regulates the federal government . . . It is for that reason that in a lawsuit to compel compliance with NEPA, *no one but the federal government can be a defendant*." Sierra Club, 995 F.2d at 1485 (9th Cir. 1993) (emphasis added).

The rule does not change for claims brought under the Organic Act, CMIA, Grand Canyon Protection Act, or the National Park Service's implementing regulations, policies, or management plans. See e.g., Forest Conservation Council, 66 F.3d at 1493 n.11 (9th Cir. 1995) (extending rule beyond NEPA to National Forest Management Act (NFMA) claims based upon the same reasoning); High Sierra Hikers Assn. v. Powell, CV 00-1239-EDL, slip order pp. 5 & 6 (N.D. Cal. July 24, 2000) (extending rule to Wilderness Act claims); Riverhawks v. Zepeda, CV 01-3035-AA, slip opinion and order pp. 7-8 (D. Or. Aug. 24, 2001) (extending rule to Wild and Scenic Rivers Act claims); and Hells Canyon Preservation Council v. U.S. Forest Service, CV 00-755-HU, slip order pp. 9 & 13 (D. Or. Dec. 18, 2000) (extending rule to Hells Canyon National Recreation Area Act claims). Again, the rationale is that these federal laws *only* require action by the federal government. As such, "no one but the federal government can be a defendant." Sierra Club, 995 F. 2d at 1485.

Here, the GCPBA fails to demonstrate that they have a "significantly protectable" interest in this case. As explained above, the GCPBA cannot comply with the federal laws and regulations at issue in this litigation. The GCPBA cannot be ordered to comply with NEPA, the Organic Act, Grand Canyon Protection Act, CMIA, or the NPS's own regulations, policies, or management plans. Likewise, the GCPBA cannot be held liable under such laws and regulations. On its face, therefore, the GCPBA does not have a "significantly protectable interest" in this case. See Sierra Club, 995 F. 2d at 1485; Forest Conservation Council, 66 F. 3d at 1494-95.

Moreover, the GCPBA has not alleged, nor could it allege, any harm to a tangible, legally protectable, or concrete interest. The only interest alleged by the GCPBA is in the NPS's allocation of boating permits and the remote chance that such interests could be impaired if the case is remanded to the agency to "reconsider its decision to increase the allocation to private boaters." GCPBA's Memo. at 5. In other words, the GCPBA's

alleged interest and harm stems only from the NPS's reconsideration of its permit allocation system and the remote chance that, in so doing, it will decide to decrease the permit allocations to private boaters. Such an attenuated, generalized threat to GCPBA's alleged interest does not suffice. See e.g., Portland Audubon Society, 866 F. 2d at 304.[1]

In their motion, the GCPBA counters that it has a significantly protectable interest in this case because it "filed the litigation that led to the NPS's decision under challenge here" and should be allowed to participate "*to support the outcome of the process it 'sponsored*' or otherwise precipitated." GCPBA Memo. at 4 (emphasis added). This, however, is inaccurate. While the GCPBA did file the original lawsuit that led to the preparation of the new Colorado River Management Plan ("CRMP") at issue in this case, the GCPBA is not "supporting the outcome of the process it sponsored." In fact, just the opposite is true: the board of the GCPBA is actually abandoning the outcome of the process it originally sponsored.

In the original lawsuit, Grand Canyon Private Boaters Ass'n v. Arnberger, No CV-00-1277 PCT-PGR (D. Ariz. October 2, 2000), the GCPBA challenged: (1) the NPS's authorization of motorboats and helicopters in the Colorado River corridor in the Grand Canyon as violating the Agency's duty to manage for wilderness character; (2) the NPS's

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[1] The GCPBA does not have a contract with the NPS that may be impacted by the litigation. However, even if they did, the outcome would be the same. As articulated in Plaintiffs' response to the GCROA's motion to intervene, the Ninth Circuit has squarely held that the rule barring participation of private parties on the merits of claims against federal agencies extends equally to a private parties that have contracts or permits with a federal agency. See e.g., Forest Conservation Council, 66 F. 3d at 1495 (party that holds contract with federal government only allowed to intervene in the remedy phase of the lawsuit); Wetlands Action Network, 222 F.3d at 1114 (upholding denial of permittee's application to intervene in NEPA case); Forest Guardians v. Bureau of Land Management, 188 F.R.D. 389, 396 (D. N.M. 1999) (denying Forest Service livestock permittees' application to intervene).

failure to comply with NEPA; and (3) the NPS's inequitable permit allocation system. See Grand Canyon Private Boaters Ass'n v. Arnberger, No CV-00-1277 PCT-PGR (D. Ariz. October 2, 2000), Docket No. 2 (First Amended Complaint). Specifically, the GCPBA alleged that the NPS has "authorized and/or permitted commercial activities, including motorized watercraft and helicopter use, at [Grand Canyon National Park] . . .at levels, frequencies, and numbers that have caused, and continue to cause, substantial adverse impacts to the wilderness qualities of lands proposed by NPS for wilderness designation. Accordingly, [the NPS's] actions in this regard are arbitrary and capricious." Id. at ¶ 65. The GCPBA also alleged that the NPS "failed to revise the allocation of river use permits between commercial concessionaires and private rafters despite their awareness of substantial data that amply justifies such an equitable re-allocation." Id. at ¶ 125.

Now, the GCPBA is abandoning these earlier claims – abandoning the issues and concerns expressed in the original lawsuit. In fact, on January 25, 2005 the GCPBA signed a Memorandum of Agreement ("MOA") with the GCROA. In the January 25, 2005 MOA, the two organizations agree to: (1) "resolve all major disagreements among and between themselves" concerning the NPS's management of the Colorado River in the Grand Canyon (i.e., the subject matter of this case); (2) support the NPS's proposal to increase recreational use of the Colorado River; (3) not oppose or otherwise interfere with the continued authorization by the NPS of motorized watercraft to provide recreational river trips . . . and will not seek to reduce the level of such use; (4) not advocate for the inclusion of the Colorado River in the National Wilderness Preservation System; and (5) not challenge, obstruct, delay, or otherwise interfere with the NPS efforts to renew concessionaire contracts. See MOA at ¶¶ 4, 5, and 6.[2]

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[2] A complete copy of the MOA is available online at: www.gcpba.org/content/view/50/28/ (last visited on July 31, 2006).

In the MOA, the GCPBA even agrees to "use best efforts to discourage their [own] members" from engaging in any activity that would be inconsistent with the MOA. See id. at ¶ 6. Without question, by signing this MOA, the GCPBA abandoned its original wilderness, NEPA, and equitable permit allocation claims. The GCPBA effectively signed away its right to renew the claims of its original lawsuit and its "protectable interest" in this case.

As such, it is both disingenuous and inaccurate for the GCPBA now to allege that they have a protectable interest in "supporting the outcome of a process that it 'sponsored.'" While the GCPBA may have filed the original lawsuit to get the CRMP process going, they certainly are not advocates for, or sponsoring, the original issues and claims presented in that case to enforce federal law and, as such, do not have a "significantly protectable" interest in this case.

In this respect, the GCPBA's purported interests in this case are very different, and distinguishable, from the interests of the applicant interventors in the Ninth Circuit's Washington State Building and Construction Trade Council v. Spellman, 684 F.2d 627, 629 (9th Cir. 1982), decision and the Tenth Circuit's holding in Coalition of Ariz/New Mexico Counties for Stable Economic Growth v. Dept. of Interior, 100 F.3d 837, 839 (10th Cir. 1996). In these two cases relied upon by the GCPBA, the applicant intervenors' position (both before and during litigation) remained consistent. The public interest group in the Washington State Building case was seeking to intervene to defend a statute that it had previously sponsored as an initiative measure. 684 F. 2d at 629. Likewise, in the Coalition of Ariz/New Mexico Counties case, Dr. Robin Silver – an advocate for the Mexican spotted owl – was seeking to intervene to defend federal protections for the species. 100 F. 3d at 839.

Here, the situation is very different. The GCPBA has flip-flopped on the issues and is seeking to intervene to defend the NPS's CRMP – seeking to defend a CRMP that

authorizes certain types and levels of use that the GCPBA specifically challenged in its original lawsuit. In fact, if the GCPBA was truly interested in intervening to advocate for the original issues in the earlier lawsuit – just as the applicant intervenors in the Washington State Building and Coalition of Ariz/New Mexico Counties cases – it would seek to intervene on the side of the Plaintiffs in this case.[3] Instead, GCPBA, in accordance with its MOA with GCROA, seeks to intervene on the side of NPS and advocate the same position that GCROA will advocate.

3. The GCPBA Failed To Demonstrate That Federal-Defendants' Representation Is Inadequate

The Ninth Circuit "considers three factors in determining the adequacy of representation: (1) whether the interest of a present party is such that it will undoubtedly

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[3] In this case Plaintiffs are seeking protection for the Grand Canyon's wilderness character, NEPA compliance, and a fair and equitable permit allocation system that would *benefit* members of the GCPBA, who wish to take non-commercial trips down the Colorado River. See Plaintiffs' Complaint ("Complaint") at Count IV. Plaintiffs are alleging that the existing permit allocation system is inequitable because it favors access to private commercial users who can afford to pay for guided trips at the expense of noncommercial users. Under the existing permit allocation system, a member of the public gains access to travel down the Colorado River by either: (1) applying for a non-commercial permit through the lottery system; or (2) paying a commercial concessionaire, which already has guaranteed allocated use of the river, to take people on a private trip down the river. As such, members of the public who have the financial means and inclination to gain river access by paying for a private commercial trip are assured a trip down the Colorado River while members of the public who cannot afford to pay a commercial outfitter and/or do not which to take a commercial trip, have no guarantee they will be able to take a trip down the Colorado River. In this case, Plaintiffs allege that the NPS's concessionaire friendly permit allocation system is "arbitrary and capricious, an abuse of discretion, and not in accordance with the Organic Act." Complaint at ¶ 166. If successful this claim will actually benefit noncommercial users such as the members of the GCPBA.

make all of a proposed intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether a proposed intervenor would offer any necessary elements to the proceeding that other parties would neglect." Arakaki v. Cayetano, 324 F.3d 1078, 1086 (9th Cir. 2003) (citing California v. Tahoe Reg'l Planning Agency, 792 F.2d 775, 778 (9th Cir. 1986)). In the Ninth Circuit, the applicant intervenor "bears the burden of demonstrating that the existing parties may not adequately represent its interests." Southwest Center for Biological Diversity v. Berg, 268 F.3d 810, 822 (9th Cir. 2001). Moreover, when "an applicant for intervention and an existing party have the same ultimate objective, a presumption of adequacy of representation arises. . . . [and] a compelling showing should be required to demonstrate inadequate representation." Arakaki, 324 F.3d at 1086 (citations omitted). This presumption of adequacy of representation is particularly applicable in cases such as this where "the government is acting on behalf of a constituency that it represents." California v. United States, 450 F. 3d 436, 443 (9th Cir. 2006). In such cases, there is "an assumption of adequacy when the government and the applicant are on the same side . . . [and] [i]n the absence of a 'very compelling showing to the contrary,' it will be presumed that a [government] adequately represents its citizens when the applicant shares the same interest." Arakaki, 324 F.3d at 1086 (quoting 7C Wright, Miller & Kane, § 1909, at 332).

Here, the GCPBA and Federal-Defendants share the same interest in upholding the validity of the National Park Service's Colorado River Management Plan (CRMP) and Final Environmental Impact Statement (FEIS) for the Colorado River corridor in the Grand Canyon. Further, the GCPBA has provided no evidence to rebut the presumption that the federal government – the Department of Justice – is adequately representing their interests. And certainly, the GCPBA has failed to make a "very compelling showing to the contrary." 7C Wright, Miller & Kane, § 1909, at 332.

B. THE GCPBA SHOULD NOT BE GRANTED THE RIGHT TO INTERVENE PERMISSIVELY

To intervene permissively, the GCPBA must establish that its claims or defenses have a question of law or fact in common with the main action. Fed. R. Civ. P. 24 (b); see also Kootenai Tribe of Idaho, 313 F.3d at 1110. If the GCPBA fails to establish this commonality of law and fact then its motion must be denied. Id. at 1111. Moreover, even if the GCPBA does assert a common question of law or fact, this Court retains "broad discretion" whether to allow it to intervene permissively. McDonald v. Means, 309 F.3d 530, 541 (9th Cir. 2002). In exercising this broad discretion, the Court must consider "whether [permissive] intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Kootenai Tribe, 313 F.3d at 1111 n.10.

Here, the Court should exercise its broad discretion and: (1) limit the GCPBA's participation to the remedy phase of the litigation; (2) limit the GCPBA's participation to the NPS's allocation of permits issue – the single issue of interest to the GCPBA; and (3) require the GCPBA to consolidate any remedy briefing with the GCROA, with whom it has an MOA to advocate the same position with respect to the CRMP.

This approach makes sense because, as mentioned earlier, the existing Parties can adequately and fully present arguments concerning whether Federal-Defendants have violated federal law and, as such, it is more appropriate to limit the GCPBA's participation to the remedy phase of the case. As explained by the Ninth Circuit, allowing third parties like the GCPBA to participate in the remedy phase of the case is proper because "[i]njunctive relief is an equitable remedy, requiring the court to engage in the traditional balance of harms analysis, even in the context of environmental litigation." Forest Conservation Council, 66 F. 3d at 1496 (citing Thomas v. Peterson, 753 F. 2d 754, 764 (9th Cir. 1985)).

In this case, should the Court find that Federal-Defendants violated federal law,

any future injunction sought by Plaintiffs will not automatically issue. Instead, a separate hearing and/or new round of briefing on the appropriate remedy will follow. At the remedy stage, the GCPBA may "present evidence to the court that 'unusual circumstances' weigh against the injunction sought, and [ ] present evidence to assist the court in fashioning the appropriate scope of whatever injunctive relief is granted." Id.

Notably, the *only issue* of interest to the GCPBA that prompted the organization to filed its motion is the NPS's allocation of permits. In the GCPBA's own words, the GCPBA's interest is in "the allocation of boating permits . . . The plaintiffs' claims could impair GCPBA's interests by causing a remand to the agency to reconsider its decision to increase allocation to private boaters." GCPBA's Memo at 5. Limiting the GCPBA's participation to this issue during the remedy phase of the litigation is therefore just and proper.

Finally, as mentioned earlier, given that the two applicant intervenors - the GCROA and GCPBA – have signed a Memorandum of Agreement ("MOA") concerning the issues presented in this case, the Court should require the two organizations to consolidate any briefing they may submit at the remedy phase. The two organizations have agreed to take the same, identical stance on the issues presented in the case and, as such, should be required to filed one, identical consolidated brief on the issues.

CONCLUSION

For the foregoing reasons, the GCPBA does not meet its burden of establishing a right to intervene as of right or permissively on the merits in this case. Plaintiffs respectfully recommend, however, that this Court allow the GCPBA to participate in this case only as to the propriety or scope of injunctive relief and with the limitations (one issue, consolidated briefing) discussed above.

Respectfully submitted this 7th day of August, 2006.

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of August, I electronically transmitted a complete copy of Plaintiffs' Response to Grand Canyon Private Boaters Association's Motion to Intervene to the following CM/ECF registrants:

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I hereby certify that on this 7th day of August, I e-mailed and mailed, via first class mail, postage pre-paid, a complete copy of Plaintiffs' Response to Grand Canyon Private Boaters Association's Motion to Intervene to the following non CM/ECF registrants:

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